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See remarks below	☐

FROM: Jan Fox DATE: 6/28/78

REMARKS:

As you requested, attached is a copy of Custis's recent letter on HR 9998 which we cleared dealing with the issue of FMC getting info from other agencies.

OMB FORM 4
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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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Reid 6/16/78

Honorable Paul N. McCloskey, Jr.
House of Representatives
Washington, D.C. 20515

Dear Congressman McCloskey:

This letter is in response to your letter of June 8 requesting additional information about the Administration's position on H.R. 9998. In response to your specific questions I am submitting the following answers:

A. Zone of Reasonableness Amendment

1. Question: What is the detailed rationale for this amendment?

Answer: As H.R. 9998 is presently drafted there is considerable doubt as to what exactly constitutes a rate which is not "just and reasonable." Although the bill does state that the FMC may take into account a variety of factors specified in the bill, there is no specific formula which indicates precisely how a "just and reasonable" rate should be calculated. Factors mentioned in the bill which are to be taken into account in determining whether a controlled carrier's rates are just and reasonable include a controlled carrier's actual or constructive costs (constructive costs being defined as the costs of non-controlled carriers operating similar vessels and equipment in the same or similar trades), the rates charged by other carriers operating in the same trade, and the rate levels necessary to assure movement of a particular cargo. While the Administration acknowledges that these factors, among others, are appropriate considerations in determining whether a rate is just and reasonable, we believe that language should be added to the bill to insure that this legislation is not misinterpreted to mean that any controlled-carrier rate below a competing conference rate is not "just and reasonable."

As you know, conference rates are not established through the competitive process. A conference tariff is the product of an agreement among the various carriers which participate in the conference. Economic theory and practical experience have shown that when prices for any product or service are established in this manner, the charge to the consumer is almost always higher than it would be in a competitive environment. For this reason, the Administration submits that rates below a conference rate level may well be just and reasonable. In fact, as a general rule, privately-owned, non-conference ocean carriers have traditionally been able to operate profitably by charging rates significantly below those charged by the conferences. Because of this fact, the Administration has proposed that language be added to H.R. 9998 to expressly provide that rates which do not fall below those charged by a non-controlled, independent carrier offering similar service in the same or a similar trade shall be presumptively just and reasonable. In addition, we propose that controlled carriers be permitted to offer rates in all trades which are as much as 15 percent below those offered by the competing conference. We believe this is a standard which fairly approximates what a reasonable independent rate level would frequently be, based on historical experience.

2. Question: Why is it inappropriate to allow the Federal Maritime Commission to disapprove rates even if they are not lower than 15 percent below conference rates or lower than other independents. Are there historical examples of FMC or any other regulatory agency's failure to exercise appropriate discretion under statutory standards similar to those provided in H.R. 9998?

Answer: The Administration is concerned that the failure to include a zone of reasonableness in H.R. 9998 may be viewed as an indication that the rates of controlled carriers should not be allowed to drop below those of a competing conference. We believe that a tendency to take this view is almost inherent in the regulatory system. According to Professor Mervin Bernstein, a recognized authority on the regulatory process:

> It is impossible to avoid the conclusion that regulation of particular industries by independent commissions tends to destroy rather than promote competition. The historical tradition of commissions is anticompetitive. In short, regulation of particular business stacks the cards against the small competitive firms and weakens the force of competition. */

This statement is of particular applicability to the FMC. According to a report by the Joint Economic Committee, the FMC and its predecessor agencies, as a result of a lack of clear legislative guidance, have tended to tolerate a much higher degree of anticompetitive activity than was originally intended by the authors of the original Shipping Act. **/

It is in recognition of this problem that the Administration has advocated the inclusion of a specific zone of reasonableness in H.R. 9998. Otherwise, we fear that the conferences will successfully persuade the Commission that any departure from conference rate practices is unjust or unreasonable.

3. Question: It has been suggested that the zone of reasonableness amendment would vitiate the bill since a conference would have to lower its rates to meet those of the controlled carriers, who in turn could again reduce their rates even further and still be not lower than 15 percent below the conference. What kinds of remedies would the conference have to respond to this type of challenge? Have conferences traditionally been able to compete effectively against other independents with a 15 percent differential in rates? Could they be expected to do so against controlled carriers?

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*/ As quoted in Meyer, Peck, Stenason and Zwick, Competition in the Transportation Industries 11 (1959).

**/ Joint Economic Comm., Report on Discriminatory Ocean Freight Rates and the Balance of Payments, S. Rep. No. 1, 89th Cong., 1st Sess., at 22 (1965).

Answer: In theory it is correct that a controlled carrier could respond to conference rate reductions by repeatedly lowering its rates to a level 15 percent below those of a competing conference. However, it is likely that, as a practical matter, this repeated rate cutting by a controlled carrier would not occur since at any time a competing conference would have the option of declaring "open rates" -- i.e., the conference members could in effect cease fixing rates for those commodities or trades which have been declared open. In this event there would be no conference rate in effect and the controlled carrier rates could not drop below those offered by the least expensive privately-owned carrier offering similar transportation services, under similar transportation conditions of carriage, and under similar tariff descriptions. Of course, if conference carriers did declare particular rates to be open, these carriers would no longer have antitrust immunity to collude on such rates.

Traditionally conference carriers have been able to compete successfully against independents offering rates as much as 15 percent below conference rates. Accordingly, we believe that the conferences could also successfully compete against controlled carriers offering similar rate discounts.

B. Foreign Policy Override Amendment

1. Question: What is the detailed rationale for this amendment?

Answer: We believe that such a provision is necessary if the President is to maintain continued control over our foreign relations. The treatment accorded foreign carriers by agencies of the United States government is necessarily an element of our foreign policy, and an administrative action which pertains solely to carriers controlled by foreign governments is a matter of special foreign policy concern. Accordingly, we have concluded that the President, who has primary responsibility for the conduct of our foreign relations, should have the opportunity to cancel or stay any action by the Commission taken under the terms of the proposed Act. In fact, the failure to include such a provision in the bill could have serious adverse consequences for our foreign policy. We also note that in 1972 Congress recognized the importance of this principle by giving the President authority to disapprove orders of the CAB affecting rates and fares charged for international air transportation. See 49 U.S.C. §1461(b).

2. The President has authority to override actions of the Civil Aeronautics Board regarding foreign air carriers. How many times, under what circumstances, has that authority been used in the past 5 years?

Answer: According to the Office of the Secretary of the CAB, during the past five years there have been 18 cases in which the President has exercised his authority to override orders of the CAB or in which the Board has decided to withdraw its order. Eight of these proceedings pertained to rates, fares, or charges for foreign air transportation; eight concerned the operating rights of carriers engaged in foreign air carriage and two involved reviews under the terms of Part 213 of the CAB's regulations, 14 C.F.R. §213.3(d). Of that total, three of the Board's orders were stayed at the President's request, six were disapproved with a request that the orders be resubmitted, five were disapproved outright, and four were withdrawn by the CAB (three at the Board's request and one at the President's request).

C. Amendment requiring full hearing before suspension where the controlled carrier rates are not comparable in form to those of other carriers

1. Question: What is the detailed rationale for this amendment?

Answer: This proposed amendment is a corollary to the Administration's proposal that controlled carrier rates should ordinarily be evaluated by reference to the rates offered by non-controlled carriers. Obviously, in some circumstances controlled carriers may offer rates which are not comparable, and it is thus necessary that the law contain a provision which deals with this situation in order to avoid freezing the rate structure and preventing innovation by non-conference carriers. We believe the best way to accomplish this goal is to require the FMC to hold a full hearing before suspending controlled carrier rates which are not comparable to the rates offered by other carriers.

2. Question: Do controlled carriers generally have tariffs that are different in form than those of other carriers? If so, are there legitimate commercial reasons for having the different form?

Answer: It is our understanding that controlled carrier tariffs are generally comparable to those published by non-controlled carriers. However, there are some circumstances in which the tariffs of controlled carriers are, for legitimate commercial reasons, not comparable.

3. Question: If the amendment were adopted, what would prevent a controlled carrier from insuring that the form of its tariff was unique in order to frustrate the suspension provisions in the bill?

Answer: It is of course theoretically possible for a controlled carrier to file rates which are not comparable to those of other carriers. However, this does not mean the FMC would be prevented from promptly suspending such rates. If a controlled carrier filed rates which were below a just and reasonable level, competing non-controlled carriers could file comparable rate structures and the FMC would then be able to apply the zone of reasonableness standard without unnecessary delay.

D. Amendment to require 30 days advance notice of rate decreases

1. Question: What is the detailed rationale for this amendment?

Answer: Under the terms of H.R. 9998 as originally introduced, the first sentence of proposed section 18(c)(3) would require controlled carriers to file all rate changes with the FMC 30 days prior to their effective date. Although the bill's language is addressed to all rate changes by controlled carriers, under Section 18(b)(2) of the Act all carriers are already required to file rate increases at least 30 days in advance of their effective date. Thus, the only change to be accomplished by this provision would be the requirement that controlled carriers file rate decreases 30 days in advance. The Administration believes this new requirement would place an unnecessary restriction on competition between controlled and non-controlled carriers. Specifically, we are concerned that under proposed section 18(c)(3) controlled carriers would be unable to make timely responses to rate decreases implemented by competing non-controlled carriers.

2. Question: If this amendment is not adopted, is it possible that a non-controlled carrier (or conference) could reduce its rates and a controlled carrier could actually be prohibited by law from lowering its rates to meet that competiton? Why isn't the bill's language giving the Commission authority to waive this 30 day requirement adequate protection for controlled carriers?

Answer: As noted in our response to question D.1, the major difficulty with the bill as now drafted is that it would prevent controlled carriers from promptly reacting to rate reductions by non-controlled carriers. The bill does permit the FMC to grant controlled carriers "special permission" to file rate reductions on less than 30 days notice. However, H.R. 9998 offers no guidance as to the circumstances in which the FMC should grant such a waiver. Thus, it is entirely possible that the Commission would generally refuse to grant a controlled carrier's request for such authority. In view of this consideration and the fact that the proposed zone of reasonableness would ordinarily be applicable, we believe that this provision serves no useful purpose and should be eliminated.

E. Access to documents amendment

1. Question: At Subcommittee markup the following provision was added to the bill:

"(3) Notwithstanding any other provisions of law, for the purpose of determining constructive costs in specific cases arising from this subsection, the Commission shall be given access to all data relating to the cost of performing ocean transportation available in the files of any other agency of the United States. The data shall be made available upon written request of the Chairman of the Commission, which request shall state that the data is to be used for the purpose of evaluating rates, charges, classifications, rules, or regulations under this subsection. Access to such data shall only be denied to the Commission upon certification by the possessing agency that release of such data would endanger the national security. The Commission and the agency upon which it may make such data request shall not disclose to the public nor to any competing carrier the name of the carrier whose data is obtained in this manner.

What are the Administration's views on this provision?

Answer: This is one provision of the bill upon which we must reserve judgment at this time, although we are initially inclined to oppose it. This provision concerns the unlimited access by the FMC to cost data maintained by any federal agency. Since it seems that the Maritime Administration would be the only agency with the type of liner data relevant to a determination of constructive costs, we are not convinced at this time that such a provision is necessary. The Maritime Administration does now and will continue to work closely with the FMC in its enforcement efforts. Furthermore, we are unaware of any instance where MARAD has in fact refused an FMC request for information. We also fear that such an access provision would be detrimental to MARAD programs. Specifically, we believe that the uncertainty of full confidentiality could hinder MARAD's ability to obtain the information necessary for the administration of these programs.

In our opinion, further consideration of the necessity for such an access provision is warranted. We would recommend, therefore, that no action on this provision be taken at this time. Instead, we submit, the two agencies should consult with each other in an effort to develop a workable system which can meet the legitimate needs of both agencies. In our view, this approach would be preferable to the enactment of legislation of dubious necessity and with potentially adverse program impact.

In any event ~~the Administration~~ we must insist that this provision be amended to exclude from its scope information gathered by the Department of Justice in the course of a grand jury investigation or pursuant to a civil investigative demand. We take this position because we believe that the Justice Department's criminal and civil investigatory files should be safeguarded to the greatest extent possible from disclosure to persons not directly involved in the investigative process. This policy protects not only the integrity of the government's law enforcement efforts but also the right of persons under investigation to be protected from the unfair inferences which may be drawn by the mere disclosure of the fact that they are under investigation.

I hope that this is responsive to your inquiries.

Sincerely yours,

Ky P. Ewing, Jr.
Deputy Assistant Attorney General
Antitrust Division

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